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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GUADALUPE O'CAMPOS,

Defendant and Appellant.

D072735

(Super. Ct. No. SCD258721)

APPEAL from a judgment of the Superior Court of San Diego County,
Amalia L. Meza, Judge. Affirmed.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marilyn
L. George, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Guadalupe O'Campos appeals from a judgment of conviction after a jury found her guilty of assaulting a child in her custody under the age of eight by means of force likely to produce great bodily injury and which resulted in the child's death (Pen. Code, § 273ab, subd. (a)).

O'Campos was convicted after her nine-month-old baby became unresponsive, was taken to a hospital, and eventually died at the hospital as a result of severe head trauma. At trial, O'Campos's defense was that her son's head trauma had been the result of two events in which the baby had fallen off of the bed in the master bedroom. A defense expert testified that the baby's injuries were consistent with such a scenario. However, multiple doctors, both those who treated the baby at the hospital as well as forensic medical experts, testified that the injuries that the baby had suffered were the result of abuse.

O'Campos was initially tried on both a murder charge and on the charge of assault of a child; the first trial resulted in a mistrial after the jury could not reach a unanimous verdict. At two points during the second trial, the jurors heard two brief references to O'Campos being in custody. Defense counsel moved for a mistrial after each brief reference, but the trial court denied both motions.

On appeal, O'Campos contends that the trial court abused its discretion in denying her motions for a mistrial because the references to her custodial status, which indicated to the jury that she had been in custody for approximately three years, irreparably

damaged her ability to receive a fair trial by undermining the presumption of innocence. We conclude that the trial court did not abuse its discretion in concluding that the brief references to O'Campos's custodial status were so insignificant in the context of the entire trial that they did not irreparably damage O'Campos's chances of receiving a fair trial. (See *People v. Clark* (2011) 52 Cal.4th 856, 990 (*Clark*).) We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution case*

a. *First responders respond to the scene*

A team of first responders was dispatched to a trauma call to an apartment at 3:04 p.m. on September 5, 2013. The team arrived at the apartment at 3:10 p.m. A paramedic member of the team saw O'Campos holding a baby. O'Campos appeared to be upset and the baby appeared limp. The paramedic put the baby, Kevin, on a sofa to evaluate him. The paramedic was concerned that Kevin was dead based on his presentation, but when he listened to Kevin's lungs and heart, he was able to ascertain that Kevin's heart was beating. When the paramedic opened Kevin's eyelids, he saw that the baby's pupils were completely dark and his eyes did not respond to the paramedic's penlight. These symptoms could indicate a head injury. Someone informed the paramedic that the baby had fallen off of a bed.

An ambulance arrived on the scene at 3:14 p.m. The paramedic took Kevin in his arms and placed him on a gurney; once inside the ambulance, paramedics stabilized Kevin's head with a rolled-up blanket in the shape of a horseshoe. As the ambulance approached Children's Hospital, Kevin exhibited "decorticate posturing," which involves clenching and extending his fists in front of him and then turning them inward. This symptom was a further indication of the existence of head trauma. The ambulance arrived at the hospital at 3:32 p.m. As Kevin was being transferred from the ambulance to the hospital's trauma staff, he suffered a "full- body seizure," indicating that his condition was "worsening."

b. *The hospital*

A pediatric surgeon was in the trauma bay when the ambulance arrived. She had been informed that a nine-month-old who had fallen from a bed was coming in, and that he had a low score on the Glasgow Coma Scale. Kevin's eyes were fixed and dilated with what medical personnel called "blown pupils." This is a brainstem response to a swollen brain. According to the surgeon, the amount of swelling that would cause the eyes to become fixed and dilated would progress over time, such that "blown pupils" would not be expected to be observed within 30 to 60 minutes of the infliction of an injury. The doctor examined Kevin's body for injuries; the only injury that the doctor observed was a small bruise on the left side of his forehead. The surgeon spoke to O'Campos using the services of a translator. O'Campos told the doctor that within the past hour, the baby had fallen from a bed and had almost immediately become limp. According to O'Campos's statements to the doctor, she had tried to give him rescue

breaths. The surgeon thought that the story that O'Campos provided was concerning because "[u]sually a fall from . . . a bed does not lead to such a devastating level of consciousness." The doctor stated that "[t]he most common trauma that we see in kids is falls from something," such as from a parent's arms, a high chair, or a grocery cart onto wood floors or tile floors. A fall from a bed, however, would not typically cause the type of injury that the doctor observed in Kevin.

A CT scan revealed the existence of a large subdural hematoma above Kevin's left eyebrow. The scan shows blood in white. In Kevin's scan, "different colors of white show[] that it's different types of blood[,]" so some of it is blood that's bleeding right now, so acute blood — hyperacute blood, some of it is within the last hour or so or three hours or so, that's acute blood, and then some looks a little bit darker, which is probably some chronic blood so blood that's been there for a day, maybe longer, I don't know."

In the operating room, after Kevin's head had been shaved in preparation for surgery, the surgeon saw multiple bruises on his scalp that were in different stages of healing. This was concerning for the doctor because "[w]hen we see injuries that are at different levels of healing, whether it be bone injuries or skin injuries or bruising, that is pathognomonic for nonaccidental trauma or a concern for child abuse."

One of the other surgeons who operated on Kevin, a pediatric neurosurgeon, testified that Kevin's dilated pupils were a sign of "herniation." She explained that "[h]erniation is movement of tissue at a rapid rate of speed in an incorrect position." According to the neurosurgeon, the "brain needs to be in its correct position to not have the neurons, glia, and blood vessels damaged, so if you have things move, things will

shear so if you have that movement, some of the cranial nerves, which are coming off of the brainstem, can get stretched." One of the signs that this has occurred is if one or both pupils enlarge; it is a "very grave sign" that is "more unusual in children because their skulls are still soft."

The situation with Kevin was so severe that the surgeons decided to "open him up" even though the anesthesiologists were still working on getting an intravenous line in him.¹ When the surgeons opened Kevin's skull, they found both old clotted blood and fresh acute blood. The presence of old blood and fresh blood was a "sign[] of multiple injuries over multiple timeframes of damage to a brain." The neurosurgeon stated that "this amount of blood in this size of a head will shift the brain." Because the bones of the Kevin's head were not yet completely fused, one of the "suture lines" was slightly more open than it should have been.² This would have been caused by "[d]irect trauma to the head," together with swelling.

Kevin died on the operating table as the surgeons were working on him.

The neurosurgeon had treated other babies who were reported to have fallen from a bed. According to the neurosurgeon, "[b]abies fall off the beds all the time." Usually, however, doctors "see tiny little hemorrhages and the babies are doing fine." The neurosurgeon offered that she had seen babies who had "fall[en] out of third-story

¹ Kevin was apparently so dehydrated that his "vessels were collapsed," making it very difficult for the two pediatric anesthesiologists to "get a line" in.

² The doctor explained that the areas where the skull was not yet fused were called "sutures."

windows, and they're still crying, and then they're laughing and they're eating [from] their bottles in the ER. Babies are actually very hard to destroy[,] thank God."

According to the neurosurgeon, she saw no signs that Kevin suffered from "any kind of clotting disorder" or had "issues with that." She further stated that Kevin's injuries were not consistent with a child who had fallen off of a bed. There "was not a doubt in [her] mind" that the injury Kevin had suffered "would have had to be repetitive head trauma because of the chronicity of the blood and direct head trauma." Swelling of the brain such as that which had occurred with Kevin "would take hours" to develop, which was inconsistent with O'Campos's report that Kevin had fallen off of the bed and had become immediately symptomatic. The brain has "a little bit of wiggle room so if you fell off a bed, immediately lost consciousness and you were starting to swell or to bleed, your fontanel (soft spot) would raise a little bit. You would not immediately go to dilated pupils. That would not happen."

The testimony of another pediatric neurosurgeon who also participated in Kevin's surgery was similar to that of the first. He agreed with the other neurosurgeon that the severe head trauma that Kevin had suffered was not caused by a fall from a bed or from getting stuck between a bed and a cardboard closet door.

c. O'Campos's statements while at the hospital

O'Campos and Kevin's father were together at the hospital. A medical social worker made contact with O'Campos after Kevin had been pronounced dead in the operating room. The medical social worker moved O'Campos and Kevin's father to a waiting room; other family members began to arrive. While in the waiting room,

O'Campos was on her phone and also talking to others in the room. The social worker wrote down O'Campos's statements. According to the social worker, O'Campos said, " 'This never, never happened to me' " and " 'He was in the middle of the bed and ran fast, fell down, could not catch him.' " She also said, " 'He fell from the bed on his forehead.' "

The social worker took O'Campos to a separate room to interview her. During the interview, O'Campos said that she had been at home with Kevin and Kevin's father. They had had visitors earlier in the day, but the visitors had left. She was about to put Kevin down for a nap at around 2:40 p.m. O'Campos said that Kevin was running in the middle of the bed and he fell. O'Campos said that after Kevin fell, she picked him up and he was crying, so she put cold water on his forehead. Then she noticed that he was turning yellow and blue and someone called 9-1-1. O'Campos said that she started blowing air into Kevin's mouth, but she did not actually tell the social worker that he had lost consciousness. At various times, O'Campos described the floor onto which Kevin fell as concrete or tile, but at another point said that the apartment was carpeted. O'Campos said that Kevin had never before fallen like that. When the social worker led O'Campos back to where Kevin's father was waiting, O'Campos hugged him and repeatedly said, " 'We were both there. We were both there.' "

A San Diego police officer arrived at Children's Hospital shortly after 7:00 p.m. He met O'Campos in a room inside the hospital and obtained some background information about O'Campos, Kevin, Kevin's father, and O'Campos's five other children from a previous relationship. At one point, O'Campos answered a call on her cell phone; the officer overheard her say several times in Spanish, " 'I dropped the baby.' " The

officer acknowledged, however, that the words O'Campos said in Spanish could also mean that she was responsible for the baby having fallen.

The officer asked O'Campos to tell him what happened that day. O'Campos said that she and Kevin's father had been lying on the bed, and Kevin was between them. Kevin suddenly got up on all fours and lunged forward, falling face first onto the tile floor. She had been unable to catch him before he fell. She picked him up. At first Kevin cried, but then he went limp and she noticed that he was not breathing and his lips began to turn blue. O'Campos said that someone had called 9-1-1 at 2:40 p.m.

The officer was with O'Campos for about three hours. During that time, he overheard her make and receive other telephone calls, and heard her repeatedly say, "[T]he baby fell' or 'I dropped the baby.' "

d. *Results from post-mortem examinations*

A forensic neuropathologist examined Kevin's brain. She found several areas of subdural bleeding, some acute, some that looked to be approximately a week old, and others that appeared to be three to four weeks old. She found "subarachnoid blood" (i.e., blood beneath the arachnoid layer within the dura) that was "acute." In her opinion, the injury that caused the subarachnoid bleeding could have been sustained up to 24 hours before Kevin's death.

An ophthalmologist who specializes in medical and surgical care of the eyes and examinations of eyes for trauma examined Kevin's eyes, reviewed his medical records, read the medical examiner's report, and studied photographs of Kevin. She examined microscopic tissues and slides and ordered special stains to help her determine whether

the hemorrhages in Kevin's eyes were old or new. The doctor explained that while the eyes are small structures, they are very complex. Both of Kevin's retinas had "obviously red hemorrhages at multiple spots." By eliminating other possible causes, the doctor opined that the hemorrhages in Kevin's eyes had been caused by "inflicted trauma." For example, a photograph of Kevin's eyes depicted microscopic retinal hemorrhages in all seven layers of the retina. The doctor explained this was a very rare occurrence; it occurs only in cases of extreme impact such as "head-crushing motor vehicle accidents" or "falling from large heights."

The ophthalmologist performed stain testing on blood from both the subdural hemorrhage and the intraocular hemorrhages. They were all negative for iron. This result was significant because it helped explain the age of the hemorrhages. By the third day following a traumatic injury, the blood in hemorrhages begins to break down, releasing its iron. The doctor explained that the lack of iron in the hemorrhages meant that the subdural hemorrhage and the retinal hemorrhages were less than three days old.

The doctor also explained that there was no papilledema present in Kevin's eyes. Papilledema is the swelling of the optic nerve caused by intracranial pressure that has been very high for at least twelve hours. Since papilledema had not yet begun, the doctor concluded that Kevin must have suffered his most recent traumatic head injury within twelve hours of his death.

A photograph of Kevin's eyes showed the presence of retinoschisis, which is the shearing of the "internal limiting membrane." Retinoschisis "means that there's been a lot of back-and-forth acceleration-deceleration forces," and it "is described as being

absolutely characteristic of abusive head trauma."³ The doctor further explained that the kind of head trauma that causes retinoschisis does not occur when a baby falls from a bed or gets wedged between a bed and a cardboard closet. The doctor stated, "[S]o with the combination of a subdural hemorrhage, no increased intracranial pressure with swelling of the optic nerve in the eye[,] and hemorrhages from all the way [from] the back to the front, that's what they actually . . . call the NAT Triad, the Nonaccidental Trauma Triad," also understood as "inflicted trauma." The doctor opined that "[w]ith the multilayer hemorrhages and the retinoschisis, I believe there shouldn't be any doubt that it's abusive head trauma."

A deputy medical examiner performed an autopsy on Kevin's body. There were seven visible injuries on Kevin's scalp, most of which were in areas that would have been concealed by his hair. Some of the bruises were very small and not all of them corresponded to internal injuries. The medical examiner found a "very thick subgaleal hemorrhage" that was "overlying most of the right side of his . . . skull." The hemorrhage was "over a very large wide area so it's either something that happened over a large part of the area or it's multiple impact sites that are now all together."⁴ When the medical examiner opened Kevin's skull, the medical examiner found multiple subdural hemorrhages. There was blood near the midline to the top of the head and near the

³ The doctor acknowledged that "there's only six other cases of retinoschisis that weren't from abusive head trauma," but said that "those were . . . major motor vehicle accidents and head-crushings."

⁴ The medical examiner agreed that this meant that the trauma inflicted on Kevin could have been "one big impact site" or "multiple hits."

brainstem, and there was blood in some of the "grooves of the brain." The examiner also saw "two more clots stuck to the dura toward the back of his head," which were in addition to one "that was near the front." The examiner also found blood that had drained down from the head into the spine. This "told" the examiner "that there was that much subdural blood that not only was it around the head, but it was going all the way and filling up the space within the spinal — or the space around the spinal cord."

The medical examiner certified that the cause of Kevin's death was blunt force trauma and indicated that the manner of death was homicide. The medical examiner ruled out an accident as a cause of death. According to the medical examiner, the trauma that Kevin had suffered would have taken hours to progress to unconsciousness and blown pupils. Further, Kevin's injuries were inconsistent with a fall from a 28- or 29-inch bed. His injuries were also inconsistent with being wedged between a bed and a closet two to four days earlier.

e. The investigation at Kevin's home

A San Diego police sergeant assigned to the homicide unit was the lead investigator regarding Kevin's death. Investigators arrived at Children's Hospital at 7:20 p.m. on the night of his death. His death was being investigated as a homicide because the witness statements about what had occurred were inconsistent with the baby's injuries. After obtaining a search warrant, the investigation team arrived at O'Campos's apartment at 3:00 a.m. Investigators collected a baby's t-shirt that appeared to have vomit on it.

Investigators found a queen-size bed and a child's Batman bed with a wooden frame in the master bedroom. The measurement from the top of the mattress on the queen-size bed to the floor was two feet four inches. One side of the queen-size bed was eight inches away from a closet. A comforter had been stuffed down between the bed and the closet doors. The closet doors were very flimsy, and the comforter pushed the bottom of the closet doors inward. On the other side of the queen-size bed, there was a space measuring 15 inches between the bed and the Batman bed.

The bedroom flooring consisted of ceramic tiles covered with stick-on carpet squares, which were approximately a quarter of an inch thick. Among a number of things that investigators found on the queen-size bed was a partially-filled baby bottle.

f. *Statements made by Kevin's father*

On the night that Kevin died, Kevin's father told the social worker at the hospital that he had not seen Kevin fall off of the bed. Kevin's father said that he had been distracted, and he did not "know how [Kevin] got to the edge of the bed . . . then he fell." He also stated that O'Campos had picked up the baby, and that is when the baby started crying. The social worker's conversation with Kevin's father was cut short when police arrived.

At a later point night, Kevin's father told a detective that he and O'Campos had been playing with Kevin when Kevin suddenly crawled very fast and fell off of the bed.

The prosecution called Kevin's father as a witness. He was 28 years old, and Kevin was his first child. He testified that while he was at work, O'Campos stayed at home and took care of the children, including Kevin. O'Campos, Kevin, and Kevin's

father slept together on a queen-size bed that was in the master bedroom. Two of O'Campos's other young children slept in the Batman bed that was in the same room.

Kevin's father testified that sometime on the morning of the day Kevin died, he left O'Campos and Kevin alone in the apartment while he went downstairs to move his car.

In a recorded statement to police, Kevin's father also said that on that day he had left O'Campos and Kevin alone in the apartment when he went downstairs to sweep for approximately 20 minutes.⁵ However, at trial, Kevin's father testified that when he went downstairs to do some sweeping, O'Campos and Kevin were not alone in the apartment. Instead, he said that some friends were with them. When he returned to the apartment around 2:00 or 2:30 in the afternoon, he took Kevin into the bedroom, fed him some formula from a bottle, and put him on the bed to take a nap. Kevin's father lay down on the bed to watch television. O'Campos was in the living room talking to a pastor. O'Campos called for him to join them, and he left Kevin sleeping on the bed. Three or four minutes later, they heard the sound of something falling to the floor. Kevin's father and O'Campos went into the bedroom and saw Kevin face-down on the floor between the two beds. Kevin's father testified that Kevin was "there on the floor lying as if he was unconscious." Kevin started moaning after O'Campos picked him up. Kevin's father acknowledged during his testimony that he had told a detective that he had been sitting on the bed, and that he heard O'Campos scream and say " 'the baby,' " and that he then

⁵ Kevin's father had testified to this same statement prior to trial, as well.

turned around and saw her holding Kevin. He had also told the detective that he had never seen Kevin on the ground. Kevin's father testified that the statements that he had made to the detective were lies.

g. Statements made by O'Campos's daughter

O'Campos's daughter A.O. was 19 years old when she testified at trial as a witness called by the prosecution. At the hospital on the night Kevin died, A.O. told a detective that when she got home from school that day, she saw Kevin sleeping in the bedroom just before she went into the bathroom. She also told the detective that Kevin's father had used her phone to call 9-1-1 and then handed the phone to her because he does not speak much English.⁶

A.O. was interviewed by police on September 5, 2013. She told the police that when she got home from school, Kevin was in the bedroom and appellant " 'was around there.' " During an interview on September 11, however, she said that when she had gone into the bathroom, both O'Campos and Kevin's father were on the bed with Kevin, and that Kevin was rolling and crawling between them.⁷

A.O. provided a different version of events when she testified at trial. She said that when she got home from school on the afternoon of September 5, 2013, O'Campos was in the kitchen, and a man named Antonio was in the living room. As A.O. walked

⁶ At trial, A.O. testified that she did not recall having told the detective that Kevin's father had placed the 9-1-1 call.

⁷ A.O. acknowledged at trial that her story had changed between her September 5 interview and her September 11 interview. She also acknowledged that the September 11 interview had taken place after she had "been home with [her] mother."

through the master bedroom to get to the bathroom, she saw Kevin's father on the bed with his eyes closed, and Kevin was sleeping next to him. About five minutes later, she heard a thump, and then heard her mother screaming that the baby had fallen from the bed. When she came out from the bathroom, she saw O'Campos in the bedroom holding Kevin. O'Campos was crying and screaming, " 'my baby.' " O'Campos also said something to the effect that her baby was dying, which struck A.O. as an unusual thing to say after a baby had fallen off of a bed. A.O. was not concerned that Kevin would have incurred an injury from falling off the bed. Kevin cried a little bit, then he stopped crying and someone called 9-1-1.

A.O. acknowledged that she had not told police about Antonio having been present in the apartment when they interviewed her on the night Kevin died, or during the interview conducted on September 11, 2013. The first time that she mentioned Antonio was in 2017.

A.O. was present in the apartment when detectives went to the apartment to talk to Kevin's father in the fall of 2014. She admitted at trial that she told Kevin's father that he did not have to talk to the detectives, and also admitted that she had tried to prevent him from talking to the detectives. However, when asked whether she had done those things because O'Campos had told her to tell Kevin's father not to talk to the police, she said, "I don't remember about that." A.O. was impeached with a recording of a telephone conversation she had with O'Campos on October 3, 2014. During that conversation, A.O. expressed frustration with Kevin's father about his "talk[ing] to the detectives," and O'Campos told her "tell him that he shouldn't talk to the detectives."

h. *Recordings of telephone calls between O'Campos and Kevin's father*

An October 2014 telephone call between O'Campos and Kevin's father was recorded. During that call, O'Campos said that she had heard that detectives had returned to the apartment and that Kevin's father had spoken to them. O'Campos told Kevin's father to tell the police that he had already spoken with them and that there was no reason for him to speak with them anymore.

In another recorded telephone conversation between O'Campos and Kevin's father that took place on October 4, 2014, O'Campos again told Kevin's father not to talk to the police. O'Campos told Kevin's father that he should have told the police that she was in the living room when Kevin fell.

2. *The defense case*

Kevin's father was also called as a defense witness. He testified that about three days before Kevin died, early in the morning, O'Campos had awakened him and told him that Kevin had fallen off the bed. At that point, Kevin was on the floor and was stuck between the bed and a plastic storage bin. From the foot of the bed, Kevin's father pulled the bed away and appellant picked up Kevin, who did not appear to be injured.

A female neighbor who lived next door to O'Campos and Kevin's father testified that she had known the couple for about two years at the time of the incident. She had never seen O'Campos behave violently toward Kevin. On September 5, 2013, the neighbor returned home at about 2:00 p.m., and a "little while later," O'Campos came out "with the children [*sic*] in her arms." O'Campos was distressed and crying. The

neighbor's husband called for an ambulance. The neighbor then followed O'Campos back to her apartment, where she saw A.O. and an older man.

A forensic pediatrician reviewed the medical and forensic records in this matter and testified for the defense. In his opinion, the findings in the records were consistent with two falls and accidental injuries. He stated that in Kevin's situation, accidental injuries cannot be distinguished from intentional injuries, and as a result, "the actual cause of death cannot be determined." According to the defense expert, severe bleeding and swelling on the right side of the brain caused the portion of the brain that regulates heart rate and respiration to stop working. He also opined that the pupil dilation, retinal hemorrhages, and retinoschisis were the result of brain swelling. The defense expert believed that the hematoma visible in the autopsy photos was between hours and two days old, but he cautioned that dating of subdural bleeding was imprecise.

The defense forensic pediatrician further testified that he believed that Kevin's head had become trapped when he fell between the bed frame and the closet doors a few days prior to his death. When Kevin's father moved the bed away from the closet by the foot of the bed, the space on the opposite corner would have narrowed before the bed was fully pulled away. This act of pulling the bed away from the wall would have resulted in "crushing pressure and some torque on the skin and the scalp." According to the defense expert, the increased pressure against Kevin's head could have caused a subdural hematoma in an area that had already suffered some bleeding.

In addition, Kevin may have also suffered from "disseminated intravascular coagulation" or "DIC," which is "where the body just starts to form microclots and use up

all of its clotting factors." If this is happening, when a second injury occurs, the person will bleed more easily because there are insufficient clotting factors to stop the bleeding. A subdural hematoma in a child of Kevin's age may go undetected because "it's very hard to understand their signs and symptoms to know that they've been injured," and the symptoms, such as irritability or changes in diet and sleep habits, can be misinterpreted. Since Kevin already had a chronic subdural hematoma from weeks earlier, that injury could have made him more susceptible to further subdural bleeding upon his head being crushed. Although there are tests that could have helped establish whether Kevin had DIC, no such tests were performed on Kevin.

B. Procedural background

O'Campos was originally charged both with assaulting a child in her custody under the age of eight by means of force likely to produce great bodily injury and which resulted in the child's death (Pen. Code,⁸ § 273ab, subd. (a)), and with murder (§ 187, subd. (a)). A jury trial commenced on March 13, 2017. On April 4, 2017, the trial court declared a mistrial after jurors were unable to reach a unanimous verdict.

The San Diego County District Attorney subsequently filed an amended information charging O'Campos with a single count of assaulting a child in her custody under the age of eight by means of force likely to produce great bodily injury and which resulted in the child's death (§ 273ab, subd. (a)).

⁸ Further statutory references are to the Penal Code unless otherwise indicated.

A second jury trial commenced on July 10, 2017. On July 21, 2017, the jury found O'Campos guilty as charged in the amended information.

The trial court sentenced O'Campos to a term of 25 years to life in state prison. O'Campos filed a timely notice of appeal.

III.

DISCUSSION

O'Campos contends that her conviction should be reversed because the trial court abused its discretion in denying her mistrial motions after the jury heard references to her being in custody. She contends that "knowing that a defendant is in custody undermines the presumption of innocence." She suggests that the jury not only knew that she was in custody, but knew that she remained in custody three years after being arrested, and that this created " 'significant danger' that jurors would speculate that appellant was denied pre-trial release because the court had concluded that she posed too great a danger to the community or that she had suffered prior convictions."⁹

⁹ O'Campos also argues that this information, together with the fact that she is a Spanish speaker, may have caused jurors to speculate on her "immigration status" and could have "infect[ed] the fact finding process with the all too common misperception that most Hispanic immigrants are violent criminals and drug dealers," thus causing her to be denied her rights to due process and a fair trial.

A. Additional procedural background

1. The first reference to O'Campos's custodial status

While Kevin's father was testifying on direct examination, the prosecutor asked him whether he was still in a relationship with O'Campos. He responded, "Even though she is in jail, we're still together."

Later that day, after the jurors were excused for the evening's recess, the trial court asked defense counsel whether he wanted to "do anything" about the witness's reference to O'Campos being in custody. Defense counsel moved for a mistrial and argued that the witness's statement constituted error that could not be cured. The prosecutor noted that she had been surprised that the witness had responded in the way that he had, given that he had never mentioned O'Campos's custodial status when the prosecutor had spoken with him previously about his relationship with O'Campos. However, the prosecutor argued that the comment was not so prejudicial as to prevent O'Campos from receiving a fair trial.

The trial court agreed with the prosecutor's assessment of the situation. The court then asked defense counsel whether he wanted the trial court to say something to the jury "or just let it go." Defense counsel was concerned that mentioning the issue to the jury would serve only to highlight the fact that O'Campos was "in custody or possibly in custody"; he suggested instead that during jury instructions, the trial court could direct the jurors not to speculate about her custodial status. The conversation on the topic ended

with the prosecutor saying that she would talk with the interpreter in the morning and tell him not to mention anything, going forward, about O'Campos being in custody, particularly because there were some recorded telephone calls that would be played, and the court and the attorneys did not want the translator mentioning "where she's calling from."

The next morning, outside the presence of the jury, defense counsel told the court that he had spoken with the interpreters who were assisting O'Campos during the trial. According to those interpreters, Kevin's father had not said the Spanish word for "jail," but had instead used the word "detained." The trial court offered to tell the jurors that there was a correction to the record. However, defense counsel was concerned about further highlighting the matter to the jury, and so asked whether the transcript could be corrected without informing the jury of the correction. The trial court and parties agreed to defense counsel's proposal. The jury ultimately did not request a read-back of the testimony of Kevin's father.

2. Second reference to O'Campos's custodial status

Later in the trial, the prosecutor played a recording from October 3, 2014, of a telephone conversation between O'Campos and her daughter A.O. During that conversation, when O'Campos asked what Kevin's father had said to the detectives, A.O. responded, "Nothing, he doesn't say anything. He doesn't even lift a finger to get you out. He just talks to the detectives and that's all."

In a reported side-bar conference, outside the presence of the jury, defense counsel noted his concern that A.O. had been heard saying "he doesn't lift a finger to get — either try to get you out or get you out," and the jury had already heard the word "jail" with respect to O'Campos. Defense counsel acknowledged that the recording had been made a long time ago, such that the jurors could infer that O'Campos had been in custody at some point in time, and was possibly "out now," but he argued that it was still a reference to her incarceration. The prosecutor told the trial court that she had forgotten that that particular line was in the portion of the recording that would be played for the jury, and said that she was surprised to hear it. However, she argued that defense counsel had already mentioned during opening statements the fact that O'Campos had been arrested in September 2014, and had also made reference to her being taken into custody in September 2014 while questioning the lead detective. She argued that the mention of O'Campos's being in custody during the telephone call therefore did not rise to the level of grounds for a mistrial. The trial court then stated, "So I don't think this will deprive her of a fair trial, and obviously you both knew what was in these transcripts and tapes and anything that's in there could possibly be presented at trial, so I need to know ahead of time if there is an issue with something so I can rule and we can redact it. So it happened. If you want me to say something to them, I will. You may decide for strategic purposes you don't want to call attention to it because they have understood that at some point she was taken into custody. That doesn't mean she's in custody right now. But it's

up to you, [defense attorney], what you want to do, and I trust, [prosecutor], that's not going to come up again."

The prosecutor responded that the recording that she had just played for the jury was the last one that she intended to play, and she suggested that the court could decline any request by the jury to send them the recording. Defense counsel agreed with that suggestion. The trial court asked defense counsel what he wanted the court to do. Defense counsel said that he did not want to draw further attention to the brief excerpt of the recording, and expressed concern that by requesting a side-bar conference, he may have already done so. The trial court then commented, "Right. I mean I think it's understood at some point she was taken into custody. What her status is right now, I don't know. I guess when [Kevin's father] said that the fact that she was detained or in custody didn't change things as far as his relationship with her is concerned. So I guess it's out there. Many times in trials it comes out and it's not earth shattering, but I always ask counsel if there's something you want me to say [to the effect] that they shouldn't consider that for purposes of determining whether or not she is guilty or not guilty, but it's your call."

Defense counsel said he did not think a curative instruction was necessary. He added: "Just for any appellate record, I'm choosing to not request anything based on strategic reasons."

3. The discussion regarding jury instructions

Toward the end of the presentation of evidence, the trial court and counsel discussed jury instructions. Although defense counsel had previously suggested that the

use of a generic jury instruction telling the jurors not to speculate about appellant's custodial status might be helpful, during the jury instruction discussion, defense counsel said nothing more about whether or how the court should address the references to O'Campos's custodial status, and never requested an instruction directing jurors not to consider O'Campos's custodial status.

B. Relevant legal standards

" 'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court's ruling denying a mistrial.' [Citations.]" (*Clark, supra*, 52 Cal.4th at p. 990).) "Whether a particular incident is so prejudicial that it warrants a mistrial 'requires a nuanced, fact-based analysis,' which is best performed by the trial court. [Citation.]" (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094.)

C. Analysis

O'Campos contends that the combined effect of the evidence referencing the fact that she had been in custody at some point and might have remained in custody at the time of trial, which was approximately three years later, constituted incurable prejudice, such that the trial court abused its discretion in denying her requests for a mistrial. She contends that this was a close case in which evidence of her custodial status would have influenced the jury's verdict. O'Campos relies on cases stating that courts may not require a defendant to wear jail clothing, noting that those cases establish that such a requirement would impair the presumption that a defendant is innocent unless proven guilty beyond a reasonable doubt; she argues that other references that tend to remind a

jury that a defendant is in custody may similarly impair the presumption of innocence. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1336 (*Bradford*) [noting that "[i]t may be inferred that other information [beyond jail clothing] having the same tendency to remind the jury that a defendant is in custody, might have a similar effect [as requiring a defendant to wear jail clothing].")])

Bradford, which O'Campos cites, is helpful in assessing whether the two statements made in the presence of the jury referencing O'Campos's custodial status—one made by a witness at trial, and the other included in a recording of an earlier telephone conversation played for jurors at trial—required the trial court to grant her request for a mistrial. Although the Supreme Court in *Bradford* concluded that the statement elicited from a witness by the prosecutor had not expressly conveyed the information that the defendant was in custody, the Supreme Court also stated that even if the witness's comment had raised the inference that the defendant was in custody, "an isolated comment that a defendant is in custody simply does not create the potential for the impairment of the presumption of innocence that might arise were such information *repeatedly* conveyed to the jury," such as would be the case were a defendant required to wear jail clothing to court during the entirety of a trial. (*Bradford, supra*, 15 Cal.4th at p. 1336.)¹⁰

¹⁰ As the *Bradford* court explained with respect to jail clothing, " 'the defendant's jail clothing is a *constant* reminder to the jury that the defendant is in custody.' " (*Bradford, supra*, 15 Cal.4th at p. 1336, italics added, quoting *People v. Taylor* (1982) 31 Cal.3d 488, 494.)

Indeed, courts have upheld the denial of a motion for mistrial despite a witness making a reference to a defendant's custodial status. For example, in *People v. Valdez* (2004) 32 Cal.4th 73, an officer testified that he had interviewed the defendant while he was at " 'Chino Institute,' " a comment that obviously revealed that the defendant was in custody. (*Id.* at p. 124.) However, because the comment was "brief and isolated," the Supreme Court concluded that the trial court had not abused its discretion in denying the defendant's motion for a mistrial. (*Id.* at p. 128.)

Similarly, in *People v. Collins* (2010) 49 Cal.4th 175, 199, a witness made a "brief and ambiguous" comment about the defendant making telephone calls from a prison. The Supreme Court concluded that the trial court had not abused its discretion in determining that any prejudicial effect from that remark could be cured by an admonition, even though defense counsel had elected to forego further admonition in order to avoid highlighting the testimony. (*Id.* at pp. 198–199.) The Supreme Court also noted that the defendant's trial strategy had included the later establishment of his "recent incarceration" through his own testimony, suggesting that given the scope of the trial, the witness's reference to the defendant being in prison was not of major significance. (*Id.* at p. 199.)

Although this case involves *two* minor comments referencing O'Campos's custodial status, one of which suggested that O'Campos had been in custody at an earlier point in time and one that suggested that she may have been in custody at the time of trial, we conclude that such minor references did not "create the potential for the

impairment of the presumption of innocence that might arise were such information *repeatedly* conveyed to the jury." (*Bradford, supra*, 15 Cal.4th at p. 1336.) The two passing comments at issue were brief and insignificant in the context of the entire trial. In addition, one of the comments referred to O'Campos's custodial status at an early point in the case, a fact about which the jury was already aware. Prior to both of the comments about which O'Campos complains, defense counsel had brought up the fact that O'Campos had been in custody at some point in time after Kevin's death. Specifically, defense counsel had mentioned during opening statements the fact that O'Campos had been arrested in September 2014, and had also referred to her September 2014 arrest when questioning the lead detective. Thus, the jury had been made aware, as part of the defendant's trial strategy, that she had been placed in custody at some point in time. As a result, the comment by A.O. in the telephone recording played for the jury in which she told O'Campos that Kevin's father was not "even lift[ing] a finger to get [O'Campos] out," did not provide the jury with any information about which it was not already aware.

The other comment, in which Kevin's father said that he was still in a relationship with O'Campos "[e]ven though she is in jail," was brief and insignificant in terms of the entire trial. Specifically, the trial consisted of five days of testimony, which included the presentation of intense and detailed medical evidence, plus an additional half day of closing arguments. In addition, the jury did not request a read-back of Kevin's father's testimony; thus, they were exposed to his passing comment about her custodial status only a single time during the entirety of the lengthy trial.

Given the brevity of the comments, as well as the fact that one of the comments provided essentially no new information to the jury regarding O'Campos's custodial status early in the case, we conclude that the trial court did not abuse its discretion in determining that an admonishment to the jury not to speculate about O'Campos's custodial status could have cured any potential prejudice, and that a mistrial was not warranted. Although defense counsel made a strategic decision not to have the court provide an admonishment as to either remark or to provide the jury with a specific jury instruction, defense counsel's strategic decision to forego any admonitions does not mean that an admonition could not have cured any possible prejudice that might have arisen from these comments. Even in the absence of any curative admonition, it is clear that these brief references simply did not rise to the level of denying O'Campos a fair trial. In the context of all of the evidence presented at trial—much of which was detailed medical evidence—the two minor references to O'Campos's custodial status simply were not significant enough to be considered to have been a " 'constant reminder' " (*Bradford, supra*, 15 Cal.4th at p. 1336) of her custodial status or a continuing influence throughout the trial.

On this record, we conclude that the trial court did not abuse its discretion by determining that O'Campos's " 'chances of receiving a fair trial' " (*Clark, supra*, 52 Cal.4th at p. 990) were not irreparably damaged by the two brief references to her custodial status. The trial court thus did not abuse its discretion in denying O'Campos's motions for a mistrial, and the court's ruling did not deny O'Campos due process.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.